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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-307

ANTHONY JOSEPH RUSSO, JR. AND DANIEL ELLSBERG, PETITIONERS

v.

WM. MATTHEW BYRNE, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A), of the district court (Pet. App. B), and of Mr. Justice Douglas (staying petitioners' trial pending their petition for certiorari) (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals denying the petition for a writ of mandamus was entered on July 27, 1972. The petition for a writ of certiorari was filed on August 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the extraordinary writ of mandamus should have been granted to provide appellate review of an interlocutory order denying a defense discovery motion, when (1) the jury had been sworn, (2) the request for extraordinary review interrupted the criminal trial, (3) the district court had found the requested information utterly unrelated to the case or to any of the defendants' constitutional rights, and (4) there was no reason why review could not await appeal from the final judgment, if there were a conviction.

2. Whether the trial judge, on the facts of this case, followed acceptable procedure in determining *ex parte* and *in camera* that the overhearing of a single conversation of a defense lawyer or consultant in the course of a foreign intelligence electronic surveillance not directed at petitioners or their lawyers or consultants was utterly unrelated to petitioners' Fourth Amendment rights, to their attorney-client relationships, or to this case, and thus that disclosure was not warranted.

STATEMENT

Under an indictment filed in the United States District Court for the Central District of California on December 29, 1971, petitioners were charged with misappropriation of government property, improper disclosure of defense information, and conspiracy, in violation of 18 U.S.C. 641, 793 and 371.[1] The charges

[1] A prior indictment naming only petitioner Ellsberg, which the present indictment superseded, had been returned on June 28, 1971.

relate to the obtaining and disclosing of classified documents relating to the Vietnam conflict, known as the Pentagon Papers. After extensive pretrial proceedings, a jury was empanelled and sworn on July 21, 1972. The trial was then stayed by the Court of Appeals for the Ninth Circuit on July 25, 1972, while petitioners sought a writ of mandamus to review a ruling of the district court which found that a conversation of one of the "defense team" (a lawyer or consultant), which had been intercepted during the course of a foreign intelligence surveillance, involved "an event that is utterly without significance or relation in any way to this case" (Pet. App. B 5a). Although the court of appeals unanimously agreed with this finding and refused to grant mandamus, resumption of the trial has been stayed since then pursuant to an order of Mr. Justice Douglas issued on July 29, 1972.

1. The relevant facts are these. On May 2, 1972, the trial court heard oral argument and granted petitioners' motion for an order requiring the government to disclose to them the logs of any electronic surveillance of any conversation to which either petitioner was a party. It further ordered the disclosure to the court *in camera* of the logs of any surveillance of any attorney of record for the petitioners or of certain agents or employees of the attorneys (Tr. 131).[2] The possibility of *in camera* disclosure was suggested by

[2] "Tr." refers to the transcript of the pretrial proceedings in the district court beginning on May 2, 1972.

petitioners' counsel (Tr. 134).[3] The district court, however, instructed the government to await the entry of a written order before making the necessary file search because of anticipated differences between the oral announcement and the written order (Tr. 142).

On May 22, 1972, prior to the entry of the written discovery order, the government filed a sworn affidavit, executed by its chief trial counsel, stating that he was not aware of any electronic surveillance of any of the defense attorneys or any of their employees or agents. On this basis, the government also asked the district court to modify its previous oral order requiring a search of government records to determine whether any conversations of attorneys, agents, or employees had been obtained as a result of electronic surveillance.

The motion was heard by the trial court on June 20, 1972, when the court was orally advised that the search of government surveillance records required with respect to the petitioners was complete, and that the results were negative (Tr. 670). The government pointed out that the previous order set no date limitation on the period of required search for possible overhearings of attorneys or their agents or employees (Tr. 662). The court was also advised that the defense had not yet identified the employees or agents they believed should be covered (Tr. 665–669), and the court directed the defense to file a document listing the names and addresses and duties of the employees

[3] During the discussion of the procedure to be followed in the event any conversations were found to have been monitored, petitioner's counsel advised the court (Tr. 134): "I believe there is one case that allows for an in camera inspection by the Court."

and agents, and the dates of commencement of each relationship, so that the government could contest inclusion of particular names in the written order that was to be entered (Tr. 690–691).[4]

On June 27, the defense submitted its list, but the list filed at that time did not include a statement of the functions of the employees or agents or the dates of their association with the case, as the district court had required. Ruling on June 29, 1972, that petitioners had not complied with his order to submit appropriate information, the court commented: "I can't complete the order until I have the names and times" (Tr. 1641). By July 6, 1972, a written statement of the duties of the agents or employees still had not been submitted, and at that time the district court allowed the defense to state orally the nature of the employees' functions (Tr. 1998–2000). The district court's written order, issued the next day, specified the persons, places and dates required to be covered by the government's search for possible electronic surveillance of defense attorneys, employees, or agents. The court also ordered that the results of the search be filed by July 21, 1972. The order required the government to search the files of eight federal agencies for records of possible overhearings, during as much as the prior nineteen months, of sixteen individuals, using twenty-six addresses, and involving more than forty telephones.

[4] The district court later refused to include several attorneys petitioners listed when the order was entered (Tr. 1717–1719).

On July 21, 1972, as directed, a sworn affidavit was filed by the chief government attorney. The affidavit stated that the file search had been made and that (1) there had been no electronic surveillance directed at the listed individuals, (2) there had been no surveillance at the listed premises, and (3) there had been no overhearing of the oral or wire communications of any of the listed persons "except as may hereafter be disclosed to the Court *in camera* pursuant to the Court's order of May 2" providing for *in camera* disclosure. Later that day the government filed with the court *in camera* the log of a single overhearing of a conversation involving one of the listed persons as the result of a call made from a place under surveillance.

Petitioners moved for disclosure of this log. On July 25, 1972, the district court, after examining the log *in camera,* denied disclosure of the log and declined to permit a pretrial adversary hearing on its possible relevance to the case. It held that the intercepted conversation "regards an event that is utterly without significance or relation in any way to this case" and "[N]othing said in the intercepted communication could conceivably come within the attorney-client privilege." (Pet. App. B 5a–6a.)

2. While the various motions were being filed, argued, and decided, the long process of selecting a jury continued. By July 21, the jury had been selected and sworn, and opening statements to the jury were scheduled for July 26. Petitioners nevertheless applied to the court of appeals for a writ of mandamus pursuant to 28 U.S.C. 1651(a) to review the district court's

order, and on July 26 obtained a stay of the trial. A hearing was held by the court of appeals on July 26, and the court unanimously denied the writ on July 27, vacating the stay (Pet. App. A). Thereafter, an application for a stay was made to Mr. Justice Douglas as Circuit Justice, and on July 29, 1972, he granted a stay of the trial pending disposition of a petition for certiorari (Pet. App. C). The government's application to the full Court to vacate the stay was denied on August 5, 1972. This criminal trial, already begun by the swearing of the jury, has remained in suspension since late July while petitioners seek review of the denial of their discovery motion.

ARGUMENT

Petitioners now seek further appellate review of an order of the district court, entered after the commencement of their criminal trial, which determined that a single overhearing of a lawyer or consultant in the course of a foreign intelligence surveillance was utterly unrelated to the attorney-client relationship or to any other constitutional rights of petitioners and could not possibly taint the evidence to be adduced by the government in this case. The court of appeals has agreed that the overhearing could not conceivably have any relationship to petitioners, in refusing to issue a writ of mandamus to grant them access to the log and a hearing on its relevance. Petitioners' principal claim is that the trial judge erred in the procedure he followed in making that determination. But this claim—to the extent it does not become moot as a consequence of further trial proceedings—should not be subject to

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review in what is actually an interlocutory appeal in a criminal case.[5]

1. The law is settled that "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 325–326; *Cogen* v. *United States*, 278 U.S. 221; cf. *Will* v. *United States*, 389 U.S. 90, 96.

The requirement of finality as a condition of review "is an historic characteristic of federal appellate procedure" and "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324–325. As Mr. Justice Frankfurter wrote for a unanimous Court in *Cobbledick*, 309 U.S. at 325:

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[5] The petition also seeks to raise a question that is in no sense properly presented by this record. Petitioners urge the Court to consider the question expressly left open in *United States* v. *United States District Court*, 407 U.S. 297, whether electronic surveillance in foreign intelligence collection may lawfully be conducted without judicial warrant and, if so, whether the government may use the fruits of such a surveillance in a criminal prosecution (Pet. 2, 14–17). The legality of the foreign intelligence surveillance involved in this case was neither raised in nor considered by the courts below. Nor is the government seeking "the use of its fruits" (Pet. 2) in this case, and neither court below had occasion to consider whether any such attempt would be proper. Rather, the courts ruled that, since the intercepted conversation had absolutely nothing to do with petitioners, with the attorney-client relationship, or with this case, petitioners lacked standing to gain access to the log or to have a hearing on its relevancy. Thus, even apart from the interlocutory nature of this petition, the lawfulness *vel non* of foreign intelligence electronic surveillance has no bearing on the orders petitioners now want the Court to review.

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. * * * An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. * * *

These considerations apply with even greater force to preclude review of an evidentiary ruling, such as that here, made after the trial has begun and a jury empanelled. The havoc that would be wrought if criminal trials were stayed, while the parties proceeded to seek two levels of appellate review with respect to every objectionable ruling, is illustrated by what has already transpired here. Proceedings in the district court had been going on for some months. Finally, on July 10, 1972, the trial began with the process of selecting a jury. On July 21, 1972, a jury of twelve was empanelled and sworn, and on July 25, 1972, six alternate jurors were selected and sworn. By that time jeopardy had attached. See *United States* v. *Jorn,*

400 U.S. 470. Opening statements were scheduled for July 26, but the stays obtained by petitioners on July 26 and July 29 have held the trial in suspension for months and, if the writ is granted, the jurors will be held on a leash for many more months. This delay and attendant publicity have substantially increased the likelihood of a mistrial—for which petitioners have now moved (Pet. 5–6). If it becomes necessary to empanel a new jury because of this unnecessary interruption of the trial process, many weeks of the court's time as well as the time of counsel and of the jurors already selected, will have been wasted—and wholly unnecessarily wasted—since, as noted above, the question which petitioners seek to raise remains fully available to them on ordinary appellate review.

The disruptive consequences of petitioners' efforts to seek interlocutory review clearly confirm the validity of Mr. Justice Frankfurter's observation that "[f]or purposes of appellate procedure, finality * * * is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system." *Cobbledick* v. *United States, supra,* 309 U.S. at 326.[6]

[6] Contrary to petitioners' assertion (Pet. 6) that they are in a unique position facing a trial without knowing the details of an electronic surveillance, there is nothing unique about such a status. Allegations that evidence has been tainted by allegedly illegal electronic surveillance have been made in a number of criminal trials. These claims have been treated differently from other suppression applications to the extent that consideration of them has generally been delayed until *after* trial when it becomes clear what evidence the prosecution has relied upon and when the relevance of the wiretap can be more adequately

This long-settled and well-founded policy against interlocutory appeals in criminal cases is so firm that Congress has authorized only narrow exceptions to it. Thus, Congress has authorized the government to appeal interlocutory orders suppressing or excluding evidence, but only because such rulings would not otherwise be subject to review, and has permitted such review only upon certification that the appeal is not taken for delay and that the evidence is a substantial proof of a material fact. See 18 U.S.C. 3731. Compare 28 U.S.C. 1292. In the present case, by contrast, petitioners can preserve their objection to the district court's rulings for appeal from a judgment of conviction—unless, of course, the issue is mooted by dismissal of the charges or acquittal.[7] And substantial delay in the criminal process has been caused despite the explicit findings of the courts below that the information to which petitioners are demanding access is completely immaterial to the prosecution and to their constitutional interests.

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determined. See, *e.g.*, *United States* v. *Birrell*, 269 F. Supp. 716–717 (S.D.N.Y.); *United States* v. *Cole*, 325 F. Supp. 763 (S.D.N.Y.), affirmed, Nos. 72–1075–1075, June 6, 1972 (C.A. 2). Indeed, petitioners are in a more favorable position than many defendants who raise eavesdropping claims because they have already secured rulings that there has been no overhearing affecting them, their case, or their constitutional rights.

[7] This distinguishes the present case from the situation in *United States* v. *United States District Court*, *supra*, where the government sought mandamus from the court of appeals because that was the only method by which it could obtain appellate review of the district court's pre-trial order directing disclosure of the electronic surveillance.

In addition, the provision for government appeals of suppression orders is expressly made inapplicable to orders "made after the defendant has been put in jeopardy". 18 U.S.C. 3731. Thus, even though the government would have no other opportunity for securing review of the decision, and even if the prosecution would otherwise fail, Congress has adhered to the sound policy that, once the trial has begun, it should proceed without interruption by interlocutory appeals. Apart from the double jeopardy values thereby protected, that policy embodies a principle of sound judicial administration that is equally applicable to rulings the defense wants reviewed by appellate courts during trial.

2. Petitioners may not resort to the extraordinary writ of mandamus to circumvent the fundamental policy considerations which preclude appellate review at this time. "The extraordinary writs * * * may not be used to thwart the congressional policy against piecemeal appeals." *Parr* v. *United States*, 351 U.S. 513, 520–521; *Will* v. *United States*, 389 U.S. 90, 96–97. Moreover, considerations of policy aside, it is settled law that mandamus may not be employed to correct mere errors or even gross errors which do not amount "to a 'judicial usurpation' of power." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382–383. The Court explicitly held in *Will* (389 U.S. at 98): "this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." Yet it is the procedure followed by the district court

that petitioners want reviewed by mandamus. As Chief Judge Friendly recently explained in *United States* v. *DiStefano*, Nos. 72–1268, 72–1442, July 17, 1972 (C.A. 2, slip op., p. 4189):

> *Will* v. *United States*, 389 U.S. 90, 95, 104 (1967), makes plain that mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ. "While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy . . . Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382 (1953). Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power. *Id.*, at 383."

3. We, of course, do not concede that any error was committed by the district court in making its determination on the basis of an *in camera* inspection of the log of the wiretap.[8] As the courts below ruled, the threshold question where a claim of electronic surveillance is raised is one of standing. Petitioners place their primary reliance on *Alderman* v. *United States*, 394 U.S. 165 (see Pet. 6–11), but that reliance is misplaced. That case involved extensive electronic surveil-

[8] A copy of the log has been lodged with the Clerk of the Court.

lance of the defendants themselves, and thus they clearly had standing to litigate the legality of the overheading and, as the Court held, its relevance to the prosecution against them.

The present case, however, involves a single conversation, not of petitioners, but of one of their lawyers or consultants. It comes within the holding of *Taglianetti* v. *United States*, 394 U.S. 316, 317, where the Court said: "Nothing in *Alderman* * * * requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." The issue there was whether the defendant had actually been overheard and thus had standing to complain, and the Court held that the proper procedure to resolve that preliminary, although possibly controlling question, was an *ex parte, in camera* review of the surveillance logs: "Under the circumstances presented here, we cannot hold that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court'" (394 U.S. at 317–318).*

Similarly, in *Giordano* v. *United States*, 394 U.S. 310, 313, the Court held that a determination of the lawfulness of a surveillance "would make disclosure [of the logs] and further proceedings unnecessary."

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* Accord: *United States* v. *Scalo*, 461 F. 2d 345 (C.A. 7); *United States* v. *Kane*, 450 F. 2d 77, 82 (C.A. 5), certiorari denied *sub nom. Sklaroff* v. *United States*, 405 U.S. 920; *Jones* v. *United States*, 443 F. 2d 822 (C.A. 9); *United States* v. *Battaglia*, 410 F. 2d 279 (C.A. 7), certiorari denied, 396 U.S. 848; *United States* v. *Hoffa*, 426 F. 2d 1213 (C.A. 7), certiorari denied, 400 U.S. 1000.

As Justice Stewart pointed out in his concurring opinion, that determination can appropriately be made *ex parte* and *in camera* by the district court (394 U.S. at 314).

In the present case, under *Taglianetti*, the district court properly ruled *ex parte* that no Fourth Amendment interests of the petitioners were involved by the overhearing of someone else at a location in which they had no interest. And although the court did not rule *ex parte* on the legality of the surveillance under the Fourth Amendment, as authorized by *Giordano*, it did rule that there was not even a possible violation of the Sixth Amendment right to counsel. We see no reason why that threshold question, any more than a Fourth Amendment determination, must be made in an adversary hearing. On the contrary, the interests of the government and of third parties in the confidentiality of such interceptions, as recognized in *Taglianetti* and *Giordano*, made it quite appropriate for the district court to ascertain *ex parte* and *in camera* whether the interception related in any way to petitioners or their representation by counsel. Having determined categorically that there is no possible relationship of the conversation to anything petitioners may be legitimately interested in, the court correctly ruled they lacked standing to examine the log.[10]

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[10] In this criminal proceeding, of course, the only rights that are to be litigated are those of petitioners, the defendants on trial. Alleged violation of any rights of their counsel or consultants that do not bear on this case should not be engrafted onto this criminal trial.

In any event, the most that could possibly be claimed here is that the district court "erred in ruling on matters within * * * [its] jurisdiction. The extraordinary writs [however] do not reach to such cases * * *." *Parr* v. *United States*, *supra*, 351 U.S. at 520. To the extent there is any occasion for post conviction appeals, the issue can be properly and adequately preserved for review at that time.

CONCLUSION

Petitioners acknowledge the "unprecedented" posture of the case (Pet. 5). They do not challenge the validity of the principles which preclude appellate review of interlocutory orders. Nor do they question the applicability of those principles to this criminal case. Under these circumstances, we respectfully submit the petition for a writ of certiorari should be denied.

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